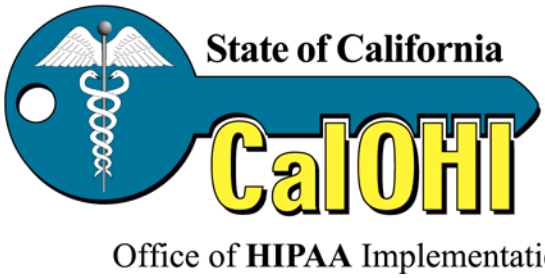

HIPAA PREEMPTION ANALYSIS

Patient Access to Health Records Act (Health and Saf. Code § 123100, et seq.)

April 18, 2003

INTRODUCTION

The following is a comprehensive analysis of the Patient Access to Health Records Act (PAHRA) for preemption by the privacy regulations promulgated pursuant to the Health Insurance Portability and Accountability Act (HIPAA). In addition, separate links contain lists of PAHRA provisions which are preempted by HIPAA and of the provisions of PAHRA which are more stringent than corresponding HIPAA provisions). The complete text of the Patient Access to Health Records Act can also be found in a separate link.

PAHRA (Health & Saf. Code § 123100, et seq.) is the State's primary law governing the access to, and amendment of, medical records, by the individual who is the subject of the records.

This analysis (and the accompanying related PAHRA preemption analysis documents) is the final and official approved preemption analysis of the California Office of HIPAA Implementation with respect to this California law.

Additional Considerations:

- This analysis is a planning document which provides baseline information only—it is the responsibility of entities regulated by the IPA and by HIPAA to become familiar with these laws and this analysis and to draft specific policies and procedures for their particular operations and needs.
- Individuals and entities regulated by the IPA and by HIPAA should have their legal and HIPAA staff carefully review this analysis (and the other related IPA preemption analysis documents) prior to HIPAA implementation.
- Because HIPAA regulations and California law are constantly changing and the body of knowledge/interpretations are complex and continually evolving, this analyses will remain subject to revision by CalOHI as required by these changes.
- This analysis represents the best judgment of CalOHI. However, because of the complexity of HIPAA regulations and their interplay with California law, there are many instances where more than one correct interpretations may apply with differing results.

Please forward any comments, corrections, etc. to the attention of:

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ANALYSIS

Health and Safety Code Section 123100:

"The Legislature finds and declares that every person having ultimate responsibility for decisions respecting his or her own health care also possesses a concomitant right of access to complete information respecting his or her condition and care provided. Similarly, persons having responsibility for decisions respecting the health care of others should, in general, have access to information on the patient's condition and care. It is, therefore, the intent of the Legislature in enacting this chapter to establish procedures for providing access to health care records or summaries of those records by patients and by those persons having responsibility for decisions respecting the health care of others."

Non-Section 1178(a)(2)(B) "Carve Out"?

No.

Section 1178(a)(2)(B) "Carve-Out"? (1st Test: Contrary To HIPAA?)

No. "Where State law exists and no analogous federal requirement exists, the state requirement would not be 'contrary to' the federal requirement and would therefore not trigger preemption." (HIPAA Privacy Rule, Section-by-section Discussion of Comments, 65 F.R. 82581.)

Section 1178(a)(2)(B) "Carve-Out"? (2nd Test: More Stringent Than HIPAA?)

Inapplicable.

Controlling Law(s):

No preemption. Health and Safety Code section 123100. No related or analogous HIPAA provisions.

Any Basis For An Exception Determination Request?

Inapplicable.

Health and Safety Code Section 123105(a):

"As used in this chapter:
(a) 'Health care provider' means any of the following:
(1) A health facility licensed pursuant to Chapter 2 (commencing with Section 1250) of Division 2.
(2) A clinic licensed pursuant to Chapter 1 (commencing with Section 1200) of Division 2.
(3) A home health agency licensed pursuant to Chapter 8 (commencing with Section 1725) of Division 2.
(4) A physician and surgeon licensed pursuant to Chapter 5 (commencing with Section 2000) of Division 2 of the Business and Professions Code or pursuant to the Osteopathic Act.
(5) A podiatrist licensed pursuant to Article 22 (commencing with Section 2460) of Chapter 5 of Division 2 of the Business and Professions Code.
(6) A dentist licensed pursuant to Chapter 4 (commencing with Section 1600) of Division 2 of the Business and Professions Code.
(7) A psychologist licensed pursuant to Chapter 6.6 (commencing with Section 2900) of Division 2 of the Business and Professions Code.
(8) An optometrist licensed pursuant to Chapter 7 (commencing with Section 3000) of Division 2 of the Business and Professions Code.
(9) A chiropractor licensed pursuant to the Chiropractic Initiative Act.
(10) A marriage and family therapist licensed pursuant to Chapter 13 (commencing with Section 4980) of Division 2 of the Business and Professions Code.
(11) A clinical social worker licensed pursuant to Chapter 14 (commencing with Section 4990) of Division 2 of the Business and Professions Code.
(12) A physical therapist licensed pursuant to Chapter 5.7 (commencing with Section 2600) of Division 2 of the Business and Professions Code."

Non-Section 1178(a)(2)(B) "Carve Out"?

No.

Section 1178(a)(2)(B) "Carve-Out"? (1st Test: Contrary To HIPAA?)

No. Section 123105(a) merely defines which types of health care providers are subject to the Patient Access to Health Records Act. "Where State law exists and no analogous federal requirement exists, the state requirement would not be 'contrary to' the federal requirement and would therefore not trigger

preemption." (HIPAA Privacy Rule, Section-by-section Discussion of Comments, 65 F.R. 82581.)

Section 1178(a)(2)(B) "Carve-Out"? (2nd Test: More Stringent Than HIPAA?)

Inapplicable.

Controlling Law(s):

No preemption. Health and Safety Code section 123105(a).

Any Basis For An Exception Determination Request?

Inapplicable.

Health and Safety Code Section 123105(b):

"As used in this chapter:
(b) 'Mental health records' means patient records, or discrete portions thereof, specifically relating to evaluation or treatment of a mental disorder. 'Mental health records' includes, but is not limited to, all alcohol and drug abuse records."

Non-Section 1178(a)(2)(B) "Carve Out"?

No.

Section 1178(a)(2)(B) "Carve-Out"? (1st Test: Contrary To HIPAA?)

No. Section 123105(a) merely defines which types of health care information are subject to the Patient Access to Health Records Act. "Where State law exists and no analogous federal requirement exists, the state requirement would not be 'contrary to' the federal requirement and would therefore not trigger preemption." (HIPAA Privacy Rule, Section-by-section Discussion of Comments, 65 F.R. 82581.)

Section 1178(a)(2)(B) "Carve-Out"? (2nd Test: More Stringent Than HIPAA?)

Inapplicable.

Controlling Law(s):

No preemption. Health and Safety Code section 123105(b).

Any Basis For An Exception Determination Request?

Inapplicable.

Health and Safety Code Section 123105(c):

"As used in this chapter:
(c) 'Patient' means a patient or former patient of a health care provider."

Non-Section 1178(a)(2)(B) "Carve Out"?

No.

Section 1178(a)(2)(B) "Carve-Out"? (1st Test: Contrary To HIPAA?)

No. The Patient Access to Health Records Act provides access to the "patient records" of "patients". HIPAA provides access to the "protected health information" of "individuals". The term "individual" is defined in HIPAA as follows: "Individual means the person who is the subject of protected health information." (45 C.F.R. § 164.501.) Thus these provisions are analogous and it would not be impossible for a covered entity to comply with this provision and with HIPAA privacy regulations.

Section 1178(a)(2)(B) "Carve-Out"? (2nd Test: More Stringent Than HIPAA?)

Inapplicable.

Controlling Law(s):

No preemption. Health and Safety Code section 123105(c). No related or analogous HIPAA provisions.

Any Basis For An Exception Determination Request?

Inapplicable.

Health and Safety Code Section 123105(d):

"As used in this chapter:
(d) 'Patient records' means records in any form or medium maintained by, or in the custody or control of, a health care provider relating to the health history, diagnosis, or condition of a patient, or relating to treatment provided or proposed to be provided to the patient. 'Patient records' includes only records pertaining to the patient requesting the records or whose representative requests the records. 'Patient records' does not include information given in confidence to a health care provider by a person other than another health care provider or the patient, and that material may be removed from any records prior to inspection or copying under Section 123110 or 123115. 'Patient records' does not include information contained in aggregate form, such as indices, registers, or logs."

Non-Section 1178(a)(2)(B) "Carve Out"?

No.

Section 1178(a)(2)(B) "Carve-Out"? (1st Test: Contrary To HIPAA?)

No. Section 123105(a) merely defines which types of health care information are subject to the Patient Access to Health Records Act. "Where State law exists and no analogous federal requirement exists, the state requirement would not be 'contrary to' the federal requirement and would therefore not trigger preemption." (HIPAA Privacy Rule, Section-by-section Discussion of Comments, 65 F.R. 82581.)

Section 1178(a)(2)(B) "Carve-Out"? (2nd Test: More Stringent Than HIPAA?)

Inapplicable.

Controlling Law(s):

No preemption. Health and Safety Code section 123105(d).

Any Basis For An Exception Determination Request?

Inapplicable.

Health and Safety Code Section 123105(e):

"As used in this chapter:
(e) 'Patient's representative' or 'representative' means a parent or the guardian of a minor who is a patient, or the guardian or conservator of the person of an adult patient, or the beneficiary or personal representative of a deceased patient."

Non-Section 1178(a)(2)(B) "Carve Out"?

No.

Section 1178(a)(2)(B) "Carve-Out"? (1st Test: Contrary To HIPAA?)

No. Section 123105(a) merely defines which persons are considered patient's representatives for purposes of the Patient Access to Health Records Act. "Where State law exists and no analogous federal requirement exists, the state requirement would not be 'contrary to' the federal requirement and would therefore not trigger preemption." (HIPAA Privacy Rule, Section-by-section Discussion of Comments, 65 F.R. 82581.)

Section 1178(a)(2)(B) "Carve-Out"? (2nd Test: More Stringent Than HIPAA?)

Inapplicable.

Controlling Law(s):

No preemption. Health and Safety Code section 123105(e).

Any Basis For An Exception Determination Request?

Inapplicable.

Health and Safety Code Section 123105(f):

"As used in this chapter:
(f) 'Alcohol and drug abuse records' means patient records, or discrete portions thereof, specifically relating to evaluation and treatment of alcoholism or drug abuse."

Non-Section 1178(a)(2)(B) "Carve Out"?

No.

Section 1178(a)(2)(B) "Carve-Out"? (1st Test: Contrary To HIPAA?)

No. Section 123105(a) merely defines which types of health care providers are subject to the Patient Access to Health Records Act. "Where State law exists and no analogous federal requirement exists, the state requirement would not be 'contrary to' the federal requirement and would therefore not trigger preemption." (HIPAA Privacy Rule, Section-by-section Discussion of Comments, 65 F.R. 82581.)

Section 1178(a)(2)(B) "Carve-Out"? (2nd Test: More Stringent Than HIPAA?)

Inapplicable.

Controlling Law(s):

No preemption. Health and Safety Code section 123105(f). No related or analogous HIPAA provisions.

Any Basis For An Exception Determination Request?

Inapplicable.

Health and Safety Code Section 123110(a):

"(a) Notwithstanding Section 5328 of the Welfare and Institutions Code, and except as provided in Sections 123115 and 123120, any adult patient of a health care provider, any minor patient authorized by law to consent to medical treatment, and any patient representative shall be entitled to inspect patient records upon presenting to the health care provider a written request for those records and upon payment of reasonable clerical costs incurred in locating and making the records available. However, a patient who is a minor shall be entitled to inspect patient records pertaining only to health care of a type for which the minor is lawfully authorized to consent. A health care provider shall permit this inspection during business hours within five working days after receipt of the written request. The inspection shall be conducted by the patient or patient's representative requesting the inspection, who may be accompanied by one other person of his or her choosing."

Non-Section 1178(a)(2)(B) "Carve Out"?

No.

Section 1178(a)(2)(B) "Carve-Out"? (1st Test: Contrary To HIPAA?)

No. HIPAA provides that:

> "A covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law."

(45 C.F.R. § 164.512(a)(1).)

The access to records by patients provided for in this subsection are "disclosures" to patients because, pursuant to HIPAA, "disclosure" means "the release, transfer, provision of access to, or divulging in any other manner of information outside the entity holding the interpretation." (45 C.F.R. § 164.501 (definition of "disclosure") [emphasis added].) Moreover, these disclosures are required, rather than permitted. Therefore HIPAA section 164.512(a) applies and this provision of law is not contrary to HIPAA because a covered entity would not find it impossible to comply with both this provision and federal requirements and because this provision would not stand as an obstacle to the accomplishment

and execution of the full purposes and objectives of HIPAA. (45 C.F.R. § 160.202 (definition of "contrary").)

Section 1178(a)(2)(B) "Carve-Out"? (2nd Test: More Stringent Than HIPAA?)

Inapplicable.

Controlling Law(s):

No preemption. Health and Safety Code section 123110(a) (by operation of HIPAA privacy regulations section 164.512(a)(1)).

Any Basis For An Exception Determination Request?

Inapplicable.

Health and Safety Code Section 123110(b):

"(b) Additionally, any patient or patient's representative shall be entitled to copies of all or any portion of the patient records that he or she has a right to inspect, upon presenting a written request to the health care provider specifying the records to be copied, together with a fee to defray the cost of copying, that shall not exceed twenty-five cents ($0.25) per page or fifty cents ($0.50) per page for records that are copied from microfilm and any additional reasonable clerical costs incurred in making the records available. The health care provider shall ensure that the copies are transmitted within 15 days after receiving the written request."

Non-Section 1178(a)(2)(B) "Carve Out"?

No.

Section 1178(a)(2)(B) "Carve-Out"? (1st Test: Contrary To HIPAA?)

No. HIPAA provides that:

> "A covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law."

(45 C.F.R. § 164.512(a)(1).)

The access to records by patients provided for in this subsection are "disclosures" to patients because, pursuant to HIPAA, "disclosure" means "the release, transfer, provision of access to, or divulging in any other manner of information outside the entity holding the interpretation." (45 C.F.R. § 164.501 (definition of "disclosure") [emphasis added].) Moreover, these disclosures are required, rather than permitted. Therefore HIPAA section 164.512(a) applies and this provision of law is not contrary to HIPAA because a covered entity would not find it impossible to comply with both this provision and federal requirements and because this provision would not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of HIPAA. (45 C.F.R. § 160.202 (definition of "contrary").)

Section 1178(a)(2)(B) "Carve-Out"? (2nd Test: More Stringent Than HIPAA?)

Inapplicable.

Controlling Law(s):

No preemption. Health and Safety Code section 123110(a) (by operation of HIPAA privacy regulations section 164.512(a)(1)).

Any Basis For An Exception Determination Request?

Inapplicable.

Health and Safety Code Section 123110(c):

"(c) Copies of X-rays or tracings derived from electrocardiography, electroencephalography, or electromyography need not be provided to the patient or patient's representative under this section, if the original X-rays or tracings are transmitted to another health care provider upon written request of the patient or patient's representative and within 15 days after receipt of the request. The request shall specify the name and address of the health care provider to whom the records are to be delivered. All reasonable costs, not exceeding actual costs, incurred by a health care provider in providing copies pursuant to this subdivision may be charged to the patient or representative requesting the copies."

Non-Section 1178(a)(2)(B) "Carve Out"?

No.

Section 1178(a)(2)(B) "Carve-Out"? (1st Test: Contrary To HIPAA?)

Yes. HIPAA provides for several exceptions and grounds for denial of an individual right of access to inspect and obtain a copy of protected health information (which includes "X-rays or tracings derived from electrocardiography, electroencephalography, or electromyography") about the individual (see 45 C.F.R. § 164.524), however, allowing the health care provider alone to choose to deny the patient access to these records because the original X-rays or tracings were already transmitted to another health care provider at the patient's or representative's request is not one of them. HIPAA privacy regulations do provide for the receipt by the patient of a summary or explanation, however HIPAA requires the patient to agree to such summary documents in lieu of direct inspection and copying in advance. (45 C.F.R. § 160.524(c)(2)(ii).)

Therefore, this provision of law is contrary to HIPAA because a covered entity would find it impossible to comply with both this provision and federal requirements and because this provision would stand as an obstacle to the accomplishment and execution of the full purposes and objectives of HIPAA. (45 C.F.R. § 160.202 (definition of "contrary").)

Section 1178(a)(2)(B) "Carve-Out"? (2nd Test: More Stringent Than HIPAA?)

No. With respect to information to be provided to an individual who is the subject of the individually identifiable health information about a use, a disclosure, rights, and remedies, this provision does not "provide the greater amount of information." (45 C.F.R. § 160.202 (definition of "more stringent", subsection (3)).)

Controlling Law(s):

Total preemption. HIPAA privacy regulation section 164.524.

Any Basis For An Exception Determination Request?

No.

Health and Safety Code Section 123110(d), (e), (f):

"(d) (1) Notwithstanding any provision of this section, and except as provided in Sections 123115 and 123120, any patient or former patient or the patient's representative shall be entitled to a copy, at no charge, of the relevant portion of the patient's records, upon presenting to the provider a written request, and proof that the records are needed to support an appeal regarding eligibility for a public benefit program. These programs shall be the Medi-Cal program, social security disability insurance benefits, and Supplemental Security Income/State Supplementary Program for the Aged, Blind and Disabled (SSI/SSP) benefits. For purposes of this subdivision, "relevant portion of the patient's records" means those records regarding services rendered to the patient during the time period beginning with the date of the patient's initial application for public benefits up to and including the date that a final determination is made by the public benefits program with which the patient's application is pending.

(2) Although a patient shall not be limited to a single request, the patient or patient's representative shall be entitled to no more than one copy of any relevant portion of his or her record free of charge.

(3) This subdivision shall not apply to any patient who is represented by a private attorney who is paying for the costs related to the patient's appeal, pending the outcome of that appeal. For purposes of this subdivision, "private attorney" means any attorney not employed by a nonprofit legal services entity.

(e) If the patient's appeal regarding eligibility for a public benefit program specified in subdivision (d) is successful, the hospital or other health care provider may bill the patient, at the rates specified in subdivisions (b) and (c), for the copies of the medical records previously provided free of charge.

(f) If a patient or his or her representative requests a record pursuant to subdivision (d), the health care provider shall ensure that the copies are transmitted within 30 days after receiving the written request."

Non-Section 1178(a)(2)(B) "Carve Out"?

No.

Section 1178(a)(2)(B) "Carve-Out"? (1st Test: Contrary To HIPAA?)

No. HIPAA provides that:

> "A covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law."

(45 C.F.R. § 164.512(a)(1).)

The access to records by patients provided for in these subsections are "disclosures" to patients because, pursuant to HIPAA, "disclosure" means "the release, transfer, provision of access to, or divulging in any other manner of information outside the entity holding the interpretation." (45 C.F.R. § 164.501 (definition of "disclosure") [emphasis added].) Moreover, these disclosures are required, rather than permitted. Therefore HIPAA section 164.512(a) applies and these provisions of law are not contrary to HIPAA because a covered entity would not find it impossible to comply with both this provision and federal requirements and because this provision would not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of HIPAA. (45 C.F.R. § 160.202 (definition of "contrary").)

Section 1178(a)(2)(B) "Carve-Out"? (2nd Test: More Stringent Than HIPAA?)

Inapplicable.

Controlling Law(s):

No preemption. Health and Safety Code section 123110(d), (e), (f) (by operation of HIPAA privacy regulations section 164.512(a)(1)).

Any Basis For An Exception Determination Request?

Inapplicable.

Health and Safety Code Section 123110(g):

"(g) This section shall not be construed to preclude a health care provider from requiring reasonable verification of identity prior to permitting inspection or copying of patient records, provided this requirement is not used oppressively or discriminatorily to frustrate or delay compliance with this section. Nothing in this chapter shall be deemed to supersede any rights that a patient or representative might otherwise have or exercise under Section 1158 of the Evidence Code or any other provision of law. Nothing in this chapter shall require a health care provider to retain records longer than required by applicable statutes or administrative regulations."

Non-Section 1178(a)(2)(B) "Carve Out"?

No.

Section 1178(a)(2)(B) "Carve-Out"? (1st Test: Contrary To HIPAA?)

No. HIPAA specifically provides that, prior to any disclosure permitted by the HIPAA privacy regulation, a covered entity must (except with respect to disclosures under Section 164.510), "verify the identity of a person requesting protected health information and the authority of any such person to have access to protected health information under [the HIPAA privacy regulation], if the identity or any such authority of such person is not known to the covered entity…." (45 C.F.R. § 164.514(h)(1)(i).)

Accordingly, this provision of law is not contrary to HIPAA because a covered entity would not find it impossible to comply with both this provision and federal requirements and because this provision would not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of HIPAA. (45 C.F.R. § 160.202 (definition of "contrary").)

Section 1178(a)(2)(B) "Carve-Out"? (2nd Test: More Stringent Than HIPAA?)

Inapplicable.

Controlling Law(s):

No preemption. Health and Safety Code section 123110(g) and HIPAA privacy regulations section 164.514(h)(1)(i).

Any Basis For An Exception Determination Request?

Inapplicable.

Health and Safety Code Section 123110(h):

"(h) This chapter shall not be construed to render a health care provider liable for the quality of his or her records or the copies provided in excess of existing law and regulations with respect to the quality of medical records. A health care provider shall not be liable to the patient or any other person for any consequences that result from disclosure of patient records as required by this chapter. A health care provider shall not discriminate against classes or categories of providers in the transmittal of X-rays or other patient records, or copies of these X-rays or records, to other providers as authorized by this section.

Every health care provider shall adopt policies and establish procedures for the uniform transmittal of X-rays and other patient records that effectively prevent the discrimination described in this subdivision. A health care provider may establish reasonable conditions, including a reasonable deposit fee, to ensure the return of original X-rays transmitted to another health care provider, provided the conditions do not discriminate on the basis of, or in a manner related to, the license of the provider to which the X-rays are transmitted."

Non-Section 1178(a)(2)(B) "Carve Out"?

No.

Section 1178(a)(2)(B) "Carve-Out"? (1st Test: Contrary To HIPAA?)

No. "Where State law exists and no analogous federal requirement exists, the state requirement would not be 'contrary to' the federal requirement and would therefore not trigger preemption." (HIPAA Privacy Rule, Section-by-section Discussion of Comments, 65 F.R. 82581.)

Section 1178(a)(2)(B) "Carve-Out"? (2nd Test: More Stringent Than HIPAA?)

Inapplicable.

Controlling Law(s):

No preemption. Health and Safety Code section 123110(h). No related or analogous HIPAA provisions.

Any Basis For An Exception Determination Request?

Inapplicable.

Health and Safety Code Section 123110(i):

"(i) Any health care provider described in paragraphs (4) to (10), inclusive, of subdivision (a) of Section 123105 who willfully violates this chapter is guilty of unprofessional conduct. Any health care provider described in paragraphs (1) to (3), inclusive, of subdivision (a) of Section 123105 that willfully violates this chapter is guilty of an infraction punishable by a fine of not more than one hundred dollars ($100). The state agency, board, or commission that issued the health care provider's professional or institutional license shall consider a violation as grounds for disciplinary action with respect to the licensure, including suspension or revocation of the license or certificate."

Non-Section 1178(a)(2)(B) "Carve Out"?

No.

Section 1178(a)(2)(B) "Carve-Out"? (1st Test: Contrary To HIPAA?)

No. HIPAA provides that:

> "The HIPAA statute provides for only two types of penalties: fines and imprisonment. Both types of penalties could be imposed in addition to the same type of penalty imposed by a state law, and should not interfere with the imposition of other types of penalties that may be available under state law."

(HIPAA Privacy Rule, Section-by-section Discussion of Comments, 65 F.R. 82582.)

Section 1178(a)(2)(B) "Carve-Out"? (2nd Test: More Stringent Than HIPAA?)

Inapplicable.

Controlling Law(s):

No preemption. Health and Safety Code section 123110(i). No related or analogous HIPAA provisions.

Any Basis For An Exception Determination Request?

Inapplicable.

Health and Safety Code Section 123110(j):

"(j) This section shall be construed as prohibiting a health care provider from withholding patient records or summaries of patient records because of an unpaid bill for health care services. Any health care provider who willfully withholds patient records or summaries of patient records because of an unpaid bill for health care services shall be subject to the sanctions specified in subdivision (i)."

Non-Section 1178(a)(2)(B) "Carve Out"?

No.

Section 1178(a)(2)(B) "Carve-Out"? (1st Test: Contrary To HIPAA?)

No. Covered entities may not deny access for any reason not set forth in HIPAA privacy rule section 164.524(a)(2) and (3). (45 C.F.R. § 164.524(a)(1).)

> "We…confirm that…failure to pay a bill [is not a] lawful reason[ ] to deny access under [the privacy] rule. Covered entities may deny access only for the reasons provided in the [privacy] rule."

(HIPAA Privacy Rule, Section-by-section Discussion of Comments, 65 F.R. 82735.)

No with respect to the sanctions set forth in this section as well, because HIPAA provides that:

> "The HIPAA statute provides for only two types of penalties: fines and imprisonment. Both types of penalties could be imposed in addition to the same type of penalty imposed by a state law, and should not interfere with the imposition of other types of penalties that may be available under state law."

(HIPAA Privacy Rule, Section-by-section Discussion of Comments, 65 F.R. 82582.)

Section 1178(a)(2)(B) "Carve-Out"? (2nd Test: More Stringent Than HIPAA?)

Inapplicable.

Controlling Law(s):

No preemption. Health and Safety Code section 123110(j) and HIPAA privacy regulation section 164.524(a)(1).

Any Basis For An Exception Determination Request?

Inapplicable.

Health and Safety Code Section 123111:

"(a) Any adult patient who inspects his or her patient records pursuant to Section 123110 shall have the right to provide to the health care provider a written addendum with respect to any item or statement in his or her records that the patient believes to be incomplete or incorrect. The addendum shall be limited to 250 words per alleged incomplete or incorrect item in the patient's record and shall clearly indicate in writing that the patient wishes the addendum to be made a part of his or her record.

(b) The health care provider shall attach the addendum to the patient's records and shall include that addendum whenever the health care provider makes a disclosure of the allegedly incomplete or incorrect portion of the patient's records to any third party.

(c) The receipt of information in a patient's addendum which contains defamatory or otherwise unlawful language, and the inclusion of this information in the patient's records, in accordance with subdivision (b), shall not, in and of itself, subject the health care provider to liability in any civil, criminal, administrative, or other proceeding.

(d) Subdivision (f) of Section 123110 and Section 123120 shall be applicable with respect to any violation of this section by a health care provider."

Non-Section 1178(a)(2)(B) "Carve Out"?

No.

Section 1178(a)(2)(B) "Carve-Out"? (1st Test: Contrary To HIPAA?)

Yes. Although HIPAA privacy regulations also provide a regulatory scheme for the amendment of patient records by patient request, there are a number of differences between that scheme and this provision. First, amendments under HIPAA are not always mandatory. (45 C.F.R. § 164.526(a)(2).) Also, HIPAA does not limit the request for an amendment to adults. (45 C.F.R. § 164.526.) In addition, there is no time limit under which the provider must include the amendment pursuant to the State provision. HIPAA, on the other hand, has a 60-day time limit for covered entities to act on the amendment request. (45 C.F.R. § 164.526(b)(2).) Further, HIPAA does not require that an amendment request be written, as this State provision does. HIPAA also requires that the person requesting the amendment be informed about the making of the amendment and must also inform certain third parties of

the amendment. (45 C.F.R. § 164.526(c)(2), (3).) HIPAA also does not limit an amendment to 250 words or less as the State provision does.

Therefore, this provision of law is contrary to HIPAA because a covered entity would not find it impossible to comply with both this provision and federal requirements and because this provision would stand as an obstacle to the accomplishment and execution of the full purposes and objectives of HIPAA. (45 C.F.R. § 160.202 (definition of "contrary").)

Section 1178(a)(2)(B) "Carve-Out"? (2nd Test: More Stringent Than HIPAA?)

No. With respect to the rights of an individual who is the subject of the individually identifiable health information of access to or amendment of individually identifiable health information, this provision does not permit greater rights of amendment. (45 C.F.R. § 160.202 (definition of "more stringent", subsection (2).)

Controlling Law(s):

Total preemption. HIPAA privacy regulations section 164.526.

Any Basis For An Exception Determination Request?

No.

Health and Safety Code Section 123115(a):

"(a) The representative of a minor shall not be entitled to inspect or obtain copies of the minor's patient records in either of the following circumstances:

(1) With respect to which the minor has a right of inspection under Section 123110.

(2) Where the health care provider determines that access to the patient records requested by the representative would have a detrimental effect on the provider's professional relationship with the minor patient or the minor's physical safety or psychological well-being. The decision of the health care provider as to whether or not a minor's records are available for inspection under this section shall not attach any liability to the provider, unless the decision is found to be in bad faith."

Non-Section 1178(a)(2)(B) "Carve Out"?

No.

Section 1178(a)(2)(B) "Carve-Out"? (1st Test: Contrary To HIPAA?)

No. HIPAA sections 164.502(g)(3)(ii)(A) and (B) "clarify that State and other applicable law governs when such law explicitly requires, permits, or prohibits, disclosure of protected health information to a parent." (HIPAA Privacy Rule, Section-by-section Description of Final Modifications and Response to Comments, 67 F.R. 53183 [emphasis added].) HIPAA section 164.502(g)(3)(ii)(B) is applicable in this instance because this State law prohibits disclosure to a parent (or other representative). (45 C.F.R. § 164.502(g)(3)(ii)(B).)

Section 1178(a)(2)(B) "Carve-Out"? (2nd Test: More Stringent Than HIPAA?)

Inapplicable.

Controlling Law(s):

No preemption. Health and Safety Code section 123115(a) (by operation of HIPAA privacy regulations section 164.502(g)(3)(ii)(B)).

Any Basis For An Exception Determination Request?

Inapplicable.

Health and Safety Code Section 123115(b):

"(b) When a health care provider determines there is a substantial risk of significant adverse or detrimental consequences to a patient in seeing or receiving a copy of mental health records requested by the patient, the provider may decline to permit inspection or provide copies of the records to the patient, subject to the following conditions

(1) The health care provider shall make a written record, to be included with the mental health records requested, noting the date of the request and explaining the health care provider's reason for refusing to permit inspection or provide copies of the records, including a description of the specific adverse or detrimental consequences to the patient that the provider anticipates would occur if inspection or copying were permitted.

(2) The health care provider shall permit inspection by, or provide copies of the mental health records to, a licensed physician and surgeon, licensed psychologist, licensed marriage and family therapist, or licensed clinical social worker, designated by request of the patient. Any marriage and family therapist registered intern, as defined in Chapter 13 (commencing with Section 4980) of Division 2 of the Business and Professions Code, may not inspect the patient's mental health records or obtain copies thereof, except pursuant to the direction or supervision of a licensed professional specified in subdivision (f) of Section 4980.40 of the Business and Professions Code. Prior to providing copies of mental health records to a marriage and family therapist registered intern, a receipt for those records shall be signed by the supervising licensed professional. The licensed physician and surgeon, licensed psychologist, licensed marriage and family therapist, licensed clinical social worker, or marriage and family therapist registered intern to whom the records are provided for inspection or copying shall not permit inspection or copying by the patient.

(3) The health care provider shall inform the patient of the provider's refusal to permit him or her to inspect or obtain copies of the requested records, and inform the patient of the right to require the provider to permit inspection by, or provide copies to, a licensed physician and surgeon, licensed psychologist, licensed marriage and family therapist, or licensed clinical social worker, designated by written authorization of the patient.

(4) The health care provider shall indicate in the mental health records of the patient whether the request was made under paragraph (2)."

Non-Section 1178(a)(2)(B) "Carve Out"?

No.

Section 1178(a)(2)(B) "Carve-Out"? (1st Test: Contrary To HIPAA?)

Yes. As used in PAHRA, "Mental health records" means "patient records, or discrete portions thereof, specifically relating to evaluation or treatment of a mental disorder." (Health and Saf. Code § 123105(b).) "Mental health records" "includes, but is not limited to, all alcohol and drug abuse records." (Ibid.) This definition includes records which would be considered "psychotherapy notes" pursuant to HIPAA privacy regulations. (45 C.F.R. § 164.501 (definition of "psychotherapy notes").)

HIPAA provides that a covered entity may deny access by an individual only under the following circumstances relevant to this issue: (1) If the records are psychotherapy notes (45 C.F.R. § 164.524(a)(1)(i)); (2) a licensed health care professional has determined, in the exercise of professional judgment, that the access requested is reasonably likely to endanger the life or physical safety of the individual or another person, and provided that the individual is given a right to have such denials reviewed (45 C.F.R. § 164.524(a)(3)(i)). Because of this distinction between psychotherapy notes and all other types of mental health records, this provision requires a dual analysis.

Mental health records other than psychotherapy notes:

Yes. Unlike HIPAA, this State law provision does not provide for a review of denial of access. In addition, the State law provision requires a determination by the provider that "there is a "substantial risk of significant adverse or detrimental consequences to a patient" in providing access. In contrast, HIPAA requires that the provider determine that provision of access would be "reasonably likely to endanger the life or physical safety of the individual." Thus, the State law provision requires a lesser level of potential harm to the patient to deny access with respect to these non-psychotherapy notes mental health records.

Accordingly, with respect to these non-psychotherapy notes mental health records this provision of law is contrary to HIPAA because a covered entity would find it impossible to comply with both this provision and federal requirements and because this provision would stand as an obstacle to the accomplishment and execution of the full purposes and objectives of HIPAA. (45 C.F.R. § 160.202 (definition of "contrary").)

Psychotherapy notes:

Yes. Unlike other types of mental health records, HIPAA has an exception that allows for an absolute non-reviewable denial of access (although we note that federal HHS "expect[s] covered entities to employ these exceptions rarely, if ever[, and]…encourage[s] covered entities that maintain psychotherapy notes…to provide individuals access to these notes when they believe it is appropriate to do so…((HIPAA Privacy Rule, Section-by-section Discussion of Comments, 65 F.R. 82733)). Since the State law provision does not contain such an absolute ground for denial of access, it is contrary to HIPAA as well.

Accordingly, with respect to psychotherapy notes this provision of law is contrary to HIPAA because a covered entity would find it impossible to comply with both this provision and federal requirements and because this provision would stand as an obstacle to the accomplishment and execution of the full purposes and objectives of HIPAA. (45 C.F.R. § 160.202 (definition of "contrary").)

Section 1178(a)(2)(B) "Carve-Out"? (2nd Test: More Stringent Than HIPAA?)

Mental health records other than psychotherapy notes:

No. First, the "significant adverse or detrimental consequences to a patient" determination in the State law would be an easier standard to meet to deny access than the HIPAA provisions and therefore makes this law less stringent, because, with respect to the rights of an individual who is the subject of the individually identifiable health information of access to or amendment of individually identifiable health information, the State law provision does not "permit[] greater rights of access or amendment, as applicable." (45 C.F.R. § 160.202 (definition of "more stringent", subsection (2).) In addition, the lack of a review of denial of access in the State law also makes it less stringent than HIPAA, because it does not "provide[] greater privacy protection for the individual who is the subject of the individually identifiable health information." 45 C.F.R. § 160.202 (definition of "more stringent", subsection (6)).)

Psychotherapy notes:

Yes. Unlike other types of mental health records, HIPAA has an exception that allows for an absolute non-reviewable denial of access (although we note that federal HHS "expect[s] covered entities to employ these exceptions rarely, if ever[, and]…encourage[s] covered entities that maintain psychotherapy notes…to provide individuals access to these notes when they believe it is appropriate to do so…((HIPAA Privacy Rule, Section-by-section Discussion of

Comments, 65 F.R. 82733)). Since the State law provision does not contain such an absolute ground for denial of access, it is contrary to HIPAA as well.

Controlling Law(s):

Partial preemption.

Mental health records other than psychotherapy notes:

HIPAA privacy regulations section 164.524(a).

Psychotherapy notes:

Health and Safety Code Section 123115(b):

Any Basis For An Exception Determination Request?

No.

Health and Safety Code Section 123120:

"Any patient or representative aggrieved by a violation of Section 123110 may, in addition to any other remedy provided by law, bring an action against the health care provider to enforce the obligations prescribed by Section 123110. Any judgment rendered in the action may, in the discretion of the court, include an award of costs and reasonable attorney fees to the prevailing party."

Non-Section 1178(a)(2)(B) "Carve Out"?

No.

Section 1178(a)(2)(B) "Carve-Out"? (1st Test: Contrary To HIPAA?)

No. "Where State law exists and no analogous federal requirement exists, the state requirement would not be 'contrary to' the federal requirement and would therefore not trigger preemption." (HIPAA Privacy Rule, Section-by-section Discussion of Comments, 65 F.R. 82581.) In addition:

> "The fact that a state law allows an individual to file a lawsuit to protect privacy does not conflict with the HIPAA penalty provisions."

(Id., at p. 82582.)

Section 1178(a)(2)(B) "Carve-Out"? (2nd Test: More Stringent Than HIPAA?)

Inapplicable.

Controlling Law(s):

No preemption. Health and Safety Code section 123120.

Any Basis For An Exception Determination Request?

Inapplicable.

Health and Safety Code Section 123130:

"(a) A health care provider may prepare a summary of the record, according to the requirements of this section, for inspection and copying by a patient. If the health care provider chooses to prepare a summary of the record rather than allowing access to the entire record, he or she shall make the summary of the record available to the patient within 10 working days from the date of the patient's request. However, if more time is needed because the record is of extraordinary length or because the patient was discharged from a licensed health facility within the last 10 days, the health care provider shall notify the patient of this fact and the date that the summary will be completed, but in no case shall more than 30 days elapse between the request by the patient and the delivery of the summary. In preparing the summary of the record the health care provider shall not be obligated to include information that is not contained in the original record.

(b) A health care provider may confer with the patient in an attempt to clarify the patient's purpose and goal in obtaining his or her record. If as a consequence the patient requests information about only certain injuries, illnesses, or episodes, this subdivision shall not require the provider to prepare the summary required by this subdivision for other than the injuries, illnesses, or episodes so requested by the patient. The summary shall contain for each injury, illness, or episode any information included in the record relative to the following:

(1) Chief complaint or complaints including pertinent history.

(2) Findings from consultations and referrals to other health care providers.

(3) Diagnosis, where determined.

(4) Treatment plan and regimen including medications prescribed.

(5) Progress of the treatment.

(6) Prognosis including significant continuing problems or conditions.

(7) Pertinent reports of diagnostic procedures and tests and all discharge summaries.

(8) Objective findings from the most recent physical examination, such as blood pressure, weight, and actual values from routine laboratory tests.

(c) This section shall not be construed to require any medical records to be written or maintained in any manner not otherwise required by law.

(d) The summary shall contain a list of all current medications prescribed, including dosage, and any sensitivities or allergies to medications recorded by the provider.

(e) Subdivision (c) of Section 123110 shall be applicable whether or not the health care provider elects to prepare a summary of the record.

(f) The health care provider may charge no more than a reasonable fee based on actual time and cost for the preparation of the summary. The cost shall be based on a computation of the actual time spent preparing the summary for availability to the patient or the patient' s representative. It is the intent of the Legislature that summaries of the records be made available at the lowest possible cost to the patient."

Non-Section 1178(a)(2)(B) "Carve Out"?

No.

Section 1178(a)(2)(B) "Carve-Out"? (1st Test: Contrary To HIPAA?)

Yes. HIPAA provides for several exceptions and grounds for denial of an individual right of access to inspect and obtain a copy of protected health information about the individual (see 45 C.F.R. § 164.524), however, allowing the health care provider alone to choose to prepare a summary of the record rather than allowing access to the entire record is not one of them.

Therefore, this provision of law is contrary to HIPAA because a covered entity would find it impossible to comply with both this provision and federal requirements and because this provision would stand as an obstacle to the accomplishment and execution of the full purposes and objectives of HIPAA. (45 C.F.R. § 160.202 (definition of "contrary").)

Section 1178(a)(2)(B) "Carve-Out"? (2nd Test: More Stringent Than HIPAA?)

No. With respect to information to be provided to an individual who is the subject of the individually identifiable health information about a use, a disclosure, rights, and remedies, this provision does not "provide the greater amount of information." (45 C.F.R. § 160.202 (definition of "more stringent", subsection (3)).)

Controlling Law(s):

Total preemption. HIPAA privacy regulation section 164.524.

Any Basis For An Exception Determination Request?

No.

Health and Safety Code Section 123135:

"Except as otherwise provided by law, nothing in this chapter shall be construed to grant greater access to individual patient records by any person, firm, association, organization, partnership, business trust, company, corporation, or municipal or other public corporation, or government officer or agency. Therefore, this chapter does not do any of the following:

(a) Relieve employers of the requirements of the Confidentiality of Medical Information Act (Part 2.6 (commencing with Section 56) of Division 1 of the Civil Code).

(b) Relieve any person subject to the Insurance Information and Privacy Protection Act (Article 6.6 (commencing with Section 791) of Chapter 1 of Part 2 of Division 1 of the Insurance Code) from the requirements of that act.

(c) Relieve government agencies of the requirements of the Information Practices Act of 1977 (Title 1.8 (commencing with Section 1798) of Part 4 of Division 3 of the Civil Code)."

Non-Section 1178(a)(2)(B) "Carve Out"?

No.

Section 1178(a)(2)(B) "Carve-Out"? (1st Test: Contrary To HIPAA?)

No. "Where State law exists and no analogous federal requirement exists, the state requirement would not be 'contrary to' the federal requirement and would therefore not trigger preemption." (HIPAA Privacy Rule, Section-by-section Discussion of Comments, 65 F.R. 82581.)

Section 1178(a)(2)(B) "Carve-Out"? (2nd Test: More Stringent Than HIPAA?)

Inapplicable.

Controlling Law(s):

No preemption. Health and Safety Code section 123125.

Any Basis For An Exception Determination Request?

Inapplicable.

Health and Safety Code Section 123140:

"The Information Practices Act of 1977 (Title 1.8 (commencing with Section 1798) of Part 4 of Division 3 of the Civil Code) shall prevail over this chapter with respect to records maintained by a state agency."

Non-Section 1178(a)(2)(B) "Carve Out"?

No.

Section 1178(a)(2)(B) "Carve-Out"? (1st Test: Contrary To HIPAA?)

No. "Where State law exists and no analogous federal requirement exists, the state requirement would not be 'contrary to' the federal requirement and would therefore not trigger preemption." (HIPAA Privacy Rule, Section-by-section Discussion of Comments, 65 F.R. 82581.)

Section 1178(a)(2)(B) "Carve-Out"? (2nd Test: More Stringent Than HIPAA?)

Inapplicable.

Controlling Law(s):

No preemption. Health and Safety Code section 123140..

Any Basis For An Exception Determination Request?

Inapplicable.

Health and Safety Code Section 123145:

"(a) Providers of health services that are licensed pursuant to Sections 1205, 1253, 1575 and 1726 have an obligation, if the licensee ceases operation, to preserve records for a minimum of seven years following discharge of the patient, except that the records of unemancipated minors shall be kept at least one year after the minor has reached the age of 18 years, and in any case, not less than seven years.

(b) The department or any person injured as a result of the licensee's abandonment of health records may bring an action in a proper court for the amount of damage suffered as a result thereof. In the event that the licensee is a corporation or partnership that is dissolved, the person injured may take action against that corporation's or partnership's principle officers of record at the time of dissolution.

(c) Abandoned means violating subdivision (a) and leaving patients treated by the licensee without access to medical information to which they are entitled pursuant to Section 123110.

Non-Section 1178(a)(2)(B) "Carve Out"?

No.

Section 1178(a)(2)(B) "Carve-Out"? (1st Test: Contrary To HIPAA?)

Subsection (a):

No. "Where State law exists and no analogous federal requirement exists, the state requirement would not be 'contrary to' the federal requirement and would therefore not trigger preemption." (HIPAA Privacy Rule, Section-by-section Discussion of Comments, 65 F.R. 82581.)

> "The retention requirement of [the privacy] regulation only applies to the documentation required by the [privacy] rule, for example, keeping a record of accounting for disclosures or copies of policies and procedures. It does not apply to medical records."

(HIPAA Privacy Rule, Section-by-section Discussion of Comments, 65 F.R. 82749.).

Subsections (b) and (c):

No. "Where State law exists and no analogous federal requirement exists, the state requirement would not be 'contrary to' the federal requirement and would therefore not trigger preemption." (HIPAA Privacy Rule, Section-by-section Discussion of Comments, 65 F.R. 82581.)

HIPAA specifically provides:

> "The fact that a state law allows an individual to file a lawsuit to protect privacy does not conflict with the HIPAA penalty provisions."

(Id., at p. 82582.)

Section 1178(a)(2)(B) "Carve-Out"? (2nd Test: More Stringent Than HIPAA?)

Inapplicable.

Controlling Law(s):

No preemption. Health and Safety Code Section 123125.

Any Basis For An Exception Determination Request?

Inapplicable.

Health and Safety Code Section 123148:

"(a) Notwithstanding any other provision of law, a health care professional at whose request a test is performed shall provide or arrange for the provision of the results of a clinical laboratory test to the patient who is the subject of the test if so requested by the patient, in oral or written form. The results shall be conveyed in plain language and in oral or written form, except the results may be conveyed in electronic form if requested by the patient and if deemed most appropriate by the health care professional who requested the test. Consent of the patient to receive his or her laboratory results by Internet posting or in other electronic form shall be obtained in a manner consistent with the requirements of Section 56.11 of the Civil Code.

(b) (1) Consent of the patient to receive his or her laboratory results by Internet posting or other electronic means shall be obtained in a manner consistent with the requirements of Section 56.10 or 56.11 of the Civil Code. In the event that a health care professional arranges for the provision of test results by Internet posting or other electronic manner, the results shall be delivered to a patient in a reasonable time period, but only after the results have been reviewed by the health care professional. Access to clinical laboratory test results shall be restricted by the use of a secure personal identification number when the results are delivered to a patient by Internet posting or other electronic manner.

(2) Nothing in paragraph (1) shall prohibit direct communication by Internet posting or the use of other electronic means to convey clinical laboratory test results by a treating health care professional who ordered the test for his or her patient or by a health care professional acting on behalf of, or with the authorization of, the treating health care professional who ordered the test.

(c) When a patient requests to receive his or her laboratory test results by Internet posting, the health care professional shall advise the patient of any charges that may be assessed directly to the patient or insurer for the service and that the patient may call the health care professional for a more detailed explanation of the laboratory test results when delivered.

(d) The electronic provision of test results under this section shall be in accordance with any applicable federal law governing privacy and security of electronic personal health records. However, any state statute, if enacted, that governs privacy and security of electronic personal health records, shall apply to test results under this section and shall prevail over federal law if federal law permits.

(e) The test results to be reported to the patient pursuant to this section shall be recorded in the patient's medical record, and shall be reported to the patient within a reasonable time period after the test results are received at the offices of the health care professional who requested the test.

(f) Notwithstanding subdivisions (a) and (b), none of the following clinical laboratory test results and any other related results shall be conveyed to a patient by Internet posting or other electronic means:

(1) HIV antibody test.

(2) Presence of antigens indicating a hepatitis infection.

(3) Abusing the use of drugs.

(4) Test results related to routinely processed tissues, including skin biopsies, Pap smear tests, products of conception, and bone marrow aspirations for morphological evaluation, if they reveal a malignancy."

(g) Patient identifiable test results and health information that have been provided under this section shall not be used for any commercial purpose without the consent of the patient, obtained in a manner consistent with the requirements of Section 56.11 of the Civil Code.

(h) Any third party to whom laboratory test results are disclosed pursuant to this section shall be deemed a provider of administrative services, as that term is used in paragraph (3) of subdivision (c) of Section 56.10 of the Civil Code, and shall be subject to all limitations and penalties applicable to that section.

(i) A patient may not be required to pay any cost, or be charged any fee, for electing to receive his or her laboratory results in any manner other than by Internet posting or other electronic form.

(j) A patient or his or her physician may revoke any consent provided under this section at any time and without penalty, except to the extent that action has been taken in reliance on that consent."

Non-Section 1178(a)(2)(B) "Carve Out"?

No.

Section 1178(a)(2)(B) "Carve-Out"? (1st Test: Contrary To HIPAA?)

No. HIPAA provides that:

> "A covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law."

(45 C.F.R. § 164.512(a)(1).)

The disclosures set forth in Section 123148 are required, rather than permitted. Therefore HIPAA section 164.512(a)(1) applies and this provision of law is not contrary to HIPAA because a covered entity would not find it impossible to comply with both this provision and federal requirements and because this provision would not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of HIPAA. (45 C.F.R. § 160.202 (definition of "contrary").)

Section 1178(a)(2)(B) "Carve-Out"? (2nd Test: More Stringent Than HIPAA?)

Inapplicable.

Controlling Law(s):

No preemption. Health and Safety Code section 123148 (by operation of HIPAA privacy regulations section 164.512(a)(1)).

Any Basis For An Exception Determination Request?

Inapplicable.

Health and Safety Code Section 123149:

"(a) Providers of health services, licensed pursuant to Sections 1205, 1253, 1575, and 1726, that utilize electronic recordkeeping systems only, shall comply with the additional requirements of this section. These additional requirements do not apply to patient records if hard copy versions of the patient records are retained.

(b) Any use of electronic recordkeeping to store patient records shall ensure the safety and integrity of those records at least to the extent of hard copy records. All providers set forth in subdivision (a) shall ensure the safety and integrity of all electronic media used to store patient records by employing an offsite backup storage system, an image mechanism that is able to copy signature documents, and a mechanism to ensure that once a record is input, it is unalterable.

(c) Original hard copies of patient records may be destroyed once the record has been electronically stored.

(d) The printout of the computerized version shall be considered the original as defined in Section 255 of the Evidence Code for purposes of providing copies to patients, the Division of Licensing and Certification, and for introduction into evidence in accordance with Sections 1550 and 1551 of the Evidence Code, in administrative or court proceedings.

(e) Access to electronically stored patient records shall be made available to the Division of Licensing and Certification staff promptly, upon request.

(f) This section does not exempt licensed clinics, health facilities, adult day health care centers, and home health agencies from the requirement of maintaining original copies of patient records that cannot be electronically stored.

(g) Any health care provider subject to this section, choosing to utilize an electronic recordkeeping system, shall develop and implement policies and procedures to include safeguards for confidentiality and unauthorized access to electronically stored patient health records, authentication by electronic signature keys, and systems maintenance.

(h) Nothing contained in this chapter shall affect the existing regulatory requirements for the access, use, disclosure, confidentiality, retention of record contents, and maintenance of health information in patient records by health care providers;

(i) This chapter does not prohibit any provider of health care services from maintaining or retaining patient records electronically."

Non-Section 1178(a)(2)(B) "Carve Out"?

No.

Section 1178(a)(2)(B) "Carve-Out"? (1st Test: Contrary To HIPAA?)

Subsection (a):

No. "Where State law exists and no analogous federal requirement exists, the state requirement would not be 'contrary to' the federal requirement and would therefore not trigger preemption." (HIPAA Privacy Rule, Section-by-section Discussion of Comments, 65 F.R. 82581.)

Subsection (b):

No. HIPAA provides that:

> "A covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law."

(45 C.F.R. § 164.512(a)(1).)

The uses set forth in Section 123149(b) are required, rather than permitted. Therefore HIPAA section 164.512(a)(1) applies and this provision of law is not contrary to HIPAA because a covered entity would not find it impossible to comply with both this provision and federal requirements and because this provision would not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of HIPAA. (45 C.F.R. § 160.202 (definition of "contrary").)

Subsection (c):

No. "Where State law exists and no analogous federal requirement exists, the state requirement would not be 'contrary to' the federal requirement and would therefore not trigger preemption." (HIPAA Privacy Rule, Section-by-section Discussion of Comments, 65 F.R. 82581.)

In addition, HIPAA specifically provides:

> "The retention requirement of [the privacy] regulation only applies to the documentation required by the [privacy] rule, for example, keeping a record of accounting for

> disclosures or copies of policies and procedures. It does not apply to medical records."

(HIPAA Privacy Rule, Section-by-section Discussion of Comments, 65 F.R. 82749.).

Subsection (d):

No. HIPAA provides that:

> "A covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law."

(45 C.F.R. § 164.512(a)(1).)

The use set forth in Section 123149(d) is required, rather than permitted. Therefore HIPAA section 164.512(a)(1) applies and this provision of law is not contrary to HIPAA because a covered entity would not find it impossible to comply with both this provision and federal requirements and because this provision would not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of HIPAA. (45 C.F.R. § 160.202 (definition of "contrary").)

Subsection (e):

No. HIPAA provides that:

> "A covered entity may use or disclose protected health information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of such law."

(45 C.F.R. § 164.512(a)(1).)

The disclosures set forth in Section 123149(e) are required, rather than permitted. Therefore HIPAA section 164.512(a)(1) applies and this provision of law is not contrary to HIPAA because a covered entity would not find it impossible to comply with both this provision and federal requirements and because this provision would not stand as an obstacle to the accomplishment

and execution of the full purposes and objectives of HIPAA. (45 C.F.R. § 160.202 (definition of "contrary").)

In addition, HIPAA provides that a covered entity may disclose protected health information to a health oversight agency for oversight activities authorized by law, including audits; civil, administrative, or criminal investigations; inspections; licensure or disciplinary actions; civil, administrative, or criminal proceedings or actions; or other activities necessary for appropriate oversight of:

> "(i) The health care system;
> (ii) Government benefit programs for which health information is relevant to beneficiary eligibility;
> (iii) Entities subject to government regulatory programs for which health information is necessary for determining compliance with program standards; or
> (iv) Entities subject to civil rights laws for which health information is necessary for determining compliance."

(45 C.F.R. § 164.512(d)(1).)

Pursuant to HIPAA, "health oversight agency" means:

> "[A]n agency or authority of the United States, a State, a territory, a political subdivision of a State or territory, or an Indian tribe, or a person or entity acting under a grant of authority from or contract with such public agency, including the employees or agents of such public agency or its contractors or persons or entities to whom it has granted authority, that is authorized by law to oversee the health care system (whether public or private) or government programs in which health information is necessary to determine eligibility or compliance, or to enforce civil rights laws for which health information is relevant."

(45 C.F.R. § 164.501.)

The Division of Licensing and Certification clearly meets this definition and the disclosures permitted in Section 123149(e) primarily meet the requirements of Section 164.512(d)(1). However, Section 164.512(d) also contains an exception to the permitted disclosures as follows:

> "For the purpose of the disclosures permitted by paragraph (d)(1) of [Section 164.512(d)], a health oversight activity does not include an investigation or other activity in which the individual is the subject of the investigation or activity and such investigation or other activity does not arise out of and is not directly related to:
>
> (i) The receipt of health care;
>
> (ii) A claim for public benefits related to health; or
>
> (iii) Qualification for, or receipt of, public benefits or services when a patient's health is integral to the claim for public benefits or services."

(45 C.F.R. § 164.512(d)(2).)

On its face, the California provision does not contain these exceptions. Accordingly, Section 164.512(d)(1) is not a basis for a conclusion that Section 123149(e) is not preempted, but, rather, it provides an additional basis for any disclosure not excepted by Section 164.512(d)(2).)

Subsection (f):

No. "Where State law exists and no analogous federal requirement exists, the state requirement would not be 'contrary to' the federal requirement and would therefore not trigger preemption." (HIPAA Privacy Rule, Section-by-section Discussion of Comments, 65 F.R. 82581.)

Subsection (g):

No. HIPAA also requires that covered entities "must have in place appropriate administrative, technical, and physical safeguards to protect the privacy of protected health information…." And also that covered entities "must reasonably safeguard protected health information from any intentional or unintentional use or disclosure that is in violation of [HIPAA Regulations]…[,]" and "reasonably safeguard protected health information to limit incidental uses or disclosures made pursuant to an otherwise permitted or required use or disclosure." (45 C.F.R. § 164.530(c) (standard and implementation specification re "safeguards").) [See also the HIPAA Final Security Standards—which detail the specific information technology security standards which covered entities must adhere to. This provision is not contrary to the Security Rule.]

Subsection (h):

No. "Where State law exists and no analogous federal requirement exists, the state requirement would not be 'contrary to' the federal requirement and would therefore not trigger preemption." (HIPAA Privacy Rule, Section-by-section Discussion of Comments, 65 F.R. 82581.)

Subsection (i):

No. "Where State law exists and no analogous federal requirement exists, the state requirement would not be 'contrary to' the federal requirement and would therefore not trigger preemption." (HIPAA Privacy Rule, Section-by-section Discussion of Comments, 65 F.R. 82581.)

Section 1178(a)(2)(B) "Carve-Out"? (2nd Test: More Stringent Than HIPAA?)

Inapplicable.

Controlling Law(s):

No preemption. Health and Safety Code section 123149 (by operation of HIPAA privacy regulations section 164.512(a)(1)); HIPAA privacy regulations section 164.512(a)(1)); 164.512(d)(1) (only in cases where none of the exceptions in 164.512(d)(2) apply); 164.530(c)

Any Basis For An Exception Determination Request?

Inapplicable.

Health and Safety Code Section 123149.5:

"(a) It is the intent of the Legislature that all medical information transmitted during the delivery of health care via telemedicine, as defined in subdivision (a) of Section 2290.5 of the Business and Professions Code, become part of the patient's medical record maintained by the licensed health care provider.

(b) This section shall not be construed to limit or waive any of the requirements of Chapter 1 (commencing with Section 123100) of Part 1 of Division 106 of the Health and Safety Code."

Non-Section 1178(a)(2)(B) "Carve Out"?

No.

Section 1178(a)(2)(B) "Carve-Out"? (1st Test: Contrary To HIPAA?)

No. "Where State law exists and no analogous federal requirement exists, the state requirement would not be 'contrary to' the federal requirement and would therefore not trigger preemption." (HIPAA Privacy Rule, Section-by-section Discussion of Comments, 65 F.R. 82581.)

Section 1178(a)(2)(B) "Carve-Out"? (2nd Test: More Stringent Than HIPAA?)

Inapplicable.

Controlling Law(s):

No preemption. Health and Safety Code Section 123149.5.

Any Basis For An Exception Determination Request?

Inapplicable.